No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant.

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

With all deference, we beg to point out that the opinion in this case does not touch on the five principal points raised in our briefs and at the argument. It is written as if the brief had never been filed, or the argument heard. Also, we beg to show a decision of the Circuit Court of Appeals of the Second Circuit reported since the decision here, which seems in direct conflict on the question of the failure to drop anchors.

The opinion finds that it was negligence for the tug to have dropped its tow line when it did; and that it was not negligence for the steamer not to have dropped her anchors during the period in which she drifted over 1800 feet towards the obvious point of danger.

The court also finds that the fouling of the tow line required the *stopping* of the engines. It makes no finding on the uncontradicted fact that the engines never were in fact out of commission by reason of the fouling, and could have been *started again* at any time after the fouling was reported to the captain off pier 42.

The five principal points made by brief and argument and ignored by the opinion, were:

I.

FIRST POINT IGNORED BY OPINION.

The uncontradicted testimony was that the fouling did not *in fact* in any way affect the engines and propeller. Without any communication with the engine room, the Captain wrongly assumed it had stopped them and wrongly failed to use them till he had drifted nearly 1800 feet and then coming to his senses tried them out and found that they worked perfectly. Even after this long delay, he backed his ship so that all but about 100 feet of his vessel cleared the projecting dock.

His failure to try his engines during his long drift, and his stupid reliance on a wrong assumption during all the period of danger, we urged was negligence. On its face, this is a clear defense if, as is demonstrable, he would have backed the additional 100 feet by a rea-

sonably diligent use of his engines. This evidence is summarized in our briefs, but we here repeat it.

Our opponent's master says in his deposition:

"Q. You didn't have any difficulty in operating the engines, did you?

A. Not after we started, no.

Q. Was that the first effort that you had made from the time that the line was cast off, as you say, up to the time that the bow-line parted?

A. Yes.

Q. Why was it that you did not make an effort to start your engines before?

A. I was *rather afraid* when the seven-inch line fouled the wheel, thinking the towboat would have it performed or we would get out without that.

Q. Didn't you think that there was a position of *danger* there?

A. *I could readily see it.*

Q. When did you first see that?

A. The danger of the line being around the wheel?

Q. No, I mean did you think there was a position of danger from your drifting down, as you have described?

A. Yes, I did.

Q. You knew that eventually you must bring up against something, did you not?

A. I surely did.

Q. How was it, I want to know why it was that you did not start your engines before you did?

A. Because I didn't want to, I was afraid to attempt that, I was depending on the towboat.

Q. Had you had any communication with the engine room from the time that the second line was cast off up to the time that the third line was cast from your bow to the tug?

A. No.

Q. Had not sent any word down to the engineers about this?

A. No.

Q. *And yet in that time you had drifted down from off pier 42 to this position between pier 34 and pier 32, is that true?*

A. *Yes.*

Q. Do you know how long that distance is?

A. No.

Q. Didn't you think that the situation there demanded that you take some risk to save your vessel from collision with the pier?

A. I was expecting the towboat to do something, depending on the towboat.

Q. You were relying on the towboat?

A. Depending on the towboat.

Q. You did not anticipate that this towboat could handle your steamer in that wind and tide without some assistance from the steamer, did you?

A. No, but it could easily swing us around, though. (Apostles pp. 67, 68, 69.)

* * * * * * *

Q. As to the fouling of the propeller, you now know, of course, that the propeller, if it was fouled at all, at the time you thought it was, was not fouled sufficiently to have prevented moving the engines, was it?

A. We found that out afterwards.

Q. So that you were acting under a misapprehension of the situation, were you?

A. Apparently, yes. (Apostles p. 76.)

Q. You concede now that your engines could have been moved?

A. That has the same effect on your mind as if it was not.

Q. Won't you concede that your engines could have been moved?

A. Anyone would have to concede that because it was done, but the effect on your mind is just the same, I should judge." (Apostles p. 78.)

Here is a clear confession of his error and fault. It is a demonstration that if the "Edith's" captain

had tried out his engines long prior to the last 200 feet of his drift he would have cleared the dock and no injury could have occurred. In the face of the known danger it is obvious that he should have done so.

We submit that we should be permitted a rehearing where demonstrable evidence and argument of this character is not given a word of consideration in the court's opinion.

II.

SECOND POINT IGNORED IN OPINION.

The opinion finds that the duty of the tug was merely that of an "assist" to the steamer. The supreme command was with the steamer's captain at the start of the maneuver. If, because of the dropping of the tow line, her captain desired the *control* of the maneuver to be transferred to the tug, the tug was entitled to know of any changed conditions on the steamer. Here a steamer, apparently of full power, without knowledge of the tug had become, in effect, a mere barge.

The tug, if it became the dominant and the steamer the mere assistant, should have been told of the steamer's captain's intent not to use his engines, based on the erroneous belief that they were disabled. As the steamer's captain says, she was as much disabled, as long as he indulged his erroneous belief, as if the engines were out of her (Apostles p. 78).

The evidence is uncontradicted that this information as to the error of the "Edith's" captain was not communicated to the tug at any time.

We argued that if the tug was the dominant she should have been told of the captain's belief so that she, the tug, could have assumed the responsibility of ordering the "Edith's" engines to be tried. It is plain that if the tug had known of this belief of the "Edith's" captain, she probably would have ordered him to try out the engines in ample time to have backed her the 100 feet further, necessary to clear the dock on which she struck. At any rate, she was entitled to have the chance to give this order.

This is a defense rational on its face. It merits, at least, the court's consideration. The opinion did not consider it. We respectfully submit that we should be heard upon it.

III.

THIRD POINT IGNORED BY THE OPINION.

We have pointed out that the tug should have been advised of the error in the "Edith's" captain's mind causing the supposed disablement of her engines.

If the tug had known this, she would not have relied on the "Edith's" engines to assist in turning into the wind by a tow line from the bow. She would have taken a line from the stern and pulled her directly backwards—lengthwise through the water. Certainly she would have covered much more than 100 feet necessary to clear the dock.

This argument we pressed on the court. It is rational on its face. It was not considered. A rational disposition of the case requires its consideration. We respectfully submit we should be reheard.

IV.

FOURTH POINT IGNORED IN OPINION.

The fourth point is that if the tug, when she became the dominant had been properly informed of the "Edith's" delusion as to her engines *she could have ordered* the "Edith" to drop her anchors. It is demonstrable that the "Edith" would have sustained no injury in this event. The tug, if she had cast on her the whole responsibility, should have been given the chance to give this order.

This is a rational defense. It was pressed in brief and argument. It is not considered in the opinion. We respectfully submit we should be given the chance to reargue it.

V.

FIFTH POINT IGNORED BY THE OPINION.

The opinion finds that it was negligent for the tug to have started out on the "assist" without learning from the steamer, the dominant, what the dominant's plans were. But, the dominant when it passed its line to the tug knew and assented to a plan of operation

based on signals. She acquiesced in the dropping of the line by hauling it in. Her captain and mate's testimony squarely shows that the "Edith" was in fault for a misunderstanding as to how her captain was to communicate to the tug. As we said in our opening brief:

It is vitally important that the "Edith's" master, who was in command of the maneuver, not only failed to communicate to the tug which of the four possible maneuvers he contemplated (Dep. pp. 50, 51, 58), but failed to give the tug any code of whistle signals to guide the tug from time to time as the maneuver he chose developed.

He, therefore, must be charged with leaving to the discretion of the master of the tug the determination from the obvious actions of the ship what the next act of the tug was to be and the reasonable expectancy that if the tug started on a maneuver which was not helpful to his plan the "Edith's" captain would advise him *viva voce* through the particular mate who guarded the end of the tow line fastened to the ship, the point to which the eye of the tug master would naturally turn.

The master of the "Edith" being the dominant mind, was therefore solely responsible if this less certain method was productive of any confusion which might possibly arise.

However, not only did the "Edith's" master fail to communicate his plan or arrange for whistle signals, but he also failed to notify the second mate in charge of the after tow line that he was to act as the agent

through whom commands would be given to direct the activities of the tug or stop her if she was not acting in coordination.

Captain McDonald's deposition says (56):

"Q. At any rate you didn't arrange any signals?
A. No.
Q. You depended on passing word by the second officer?
A. By the second officer.
Q. What was the second officer's name?
A. Hanson."

Hanson's deposition is as follows:

"Q. You said you expected the tug to get orders from the master?
A. Yes.
Q. How were you expecting the master of your ship—he was on the bridge, isn't that right?
A. Yes.
Q. How did you expect the master on the bridge of your ship to give an order to the tug to go ahead?
A. By the whistle.
Q. What whistle would he make?
A. That depends on which way they make it out between them.
Q. What?
A. They make that out between them what kind of a whistle they are going to use.
Q. They usually agree on what the signal shall be?
A. Yes." (Apostles pp. 90, 91.)

"Q. Your duty on the stern is to keep an eye on the towing line?
A. But we are not supposed to watch the tug too; he is supposed to give us a signal what to do.
Q. Who is?

A. The tug captain.

Q. What signal did you expect the tug to give?

A. I expected the tug captain to blow a short blast the same as the rest of them do.

Q. Had you ever been towed by that tug before?

A. No.

Q. Did you ever have any conversation with her master before starting out as to what signals he would give you?

A. No, sir." (Apostles p. 99.)

The "Edith's" captain expected the communication to be through the second mate; the second mate knew nothing about this, but expected the communication to pass between the two captains by whistles. He neither looked at the tug's captain nor his own but busied himself with other matters about the ship at important moments (99, 98).

In this basic disorganization from which the subsequent confusion and damage arose, the master of the tug had no part. It was not his duty to inform the "Edith's" second mate that his own captain had not advised the tug of the intended maneuver and that he had arranged no code of whistle signals with the tug, and that he, the "Edith's" mate, was the person to whom he was to look for any correction of any action on his part which did not fit into the "Edith's" undisclosed plans. When the second mate gave him the "Edith's" hawser and told him to go ahead, he was entitled to rely on the scheme of communication in both his and Captain McDonald's minds, i. e., through the second mate.

(Opening Brief, pp. 9, 10, 11.)

This is a rational statement of a fault on the "Edith's" part. If there was fault on the tug's part in planning for the "assist", it was equally shared by the steamer by her failure to make arrangements. The court's opinion nowhere considers this rational defense. We respectfully submit that we are entitled to a rehearing on this point.

VI.

THE "EDITH'S" CAPTAIN'S ADMISSION THAT HE FELL INTO HIS ERROR REGARDING THE DISABLEMENT OF THE "EDITH'S" ENGINES AT PIER 42—THAT IS AT THE BEGINNING OF HIS 1800 FOOT DRIFT.

This evidence, which was not ours but in the Edith's depositions, is set forth in the first chapter of our reply brief. It is our opponent's case, not ours. It shows abundant time to have saved the "Edith" if the tug had been put in possession of the essential fact of her captain's delusion as to his engines.

VII.

A CONFLICTING CIRCUIT COURT OF APPEALS DECISION REPORTED SINCE THE DECISION OF THIS CASE.

Since the decision of this case, there has appeared in the Federal Reporter, the case of *"The Westchester"* (Circuit Court of Appeals, Second Circuit), 254 Fed. Rep. 576, advance sheet No. 4. In this case, the Circuit Court of Appeals, Second Circuit, seems to be in complete opposition to the opinion in this case, regarding the obligation of the tow to use her anchors, where the

tug, though found negligent, has left her in a position of danger.

That case was a weaker case on causation against the tow than the one here under consideration. In that case, the tow had no anchor on board, and the court found:

> "But if an anchor had been on board, and had been used, it cannot be said with reasonable certainty that stranding would have been avoided.
>
> The tide must have been of considerable strength, for the tug's cable parted; anchors are habitually carried at the bow, and the Sinclair was being towed stern first; instant action was necessary, the available time short, and whether under such circumstances the maneuver could have been successfully performed is doubtful.
>
> To sustain the result, if not the reasoning, below, The M. E. Luckenbach (D. C.), 200 Fed. 630, affirmed 214 Fed. 571; 131 C. C. A. 177, is pressed upon us. It is true in one sense that here, as there, 'concurrent faults'—i. e., negligent acts contemporaneously operating to produce injury—do not exist. But the word relied upon, 'concurrent', must be taken as synonymous with 'contributing', and in both The Luckenbach and The Sunnyside, supra, it was found as matter of fact that, despite a fault which put a tow adrift, there would have been no resulting injury, had it not been for a new and independent piece of negligence; therefore the wrongdoer first in point of time was held not responsible, although not innocent.
>
> Here we infer negligence (i. e., unseaworthiness) in the tug from the unexplained breaking of her shaft, and find negligence admitted by the barge's admission of no anchor. When faults are thus shown, all the guilty, if their fault could have caused the injury, must, to escape liability, affirmatively show that they did not, in point of fact, cause the same. The Madison, 250 Fed. 852;

> ..... C. C. A. ..... Neither party has borne that burden, in this case; therefore the damages and costs below should be divided."
>
> *The Westchester,* 254 Fed. Rep. 576, at 578.

In the case at bar, it is obvious that with the "Edith's" engines out of commission, whether through delusion, or otherwise—she was like the barge in *The Westchester* case. The burden was therefore *upon the "Edith's" captain* to show why he did not drop his anchors.

The captain endeavored to discharge this burden by saying that he relied on the tug; but the evidence is uncontradicted that he never, at any time, communicated to the tug his delusion that his engines were out of commission. It is no excuse for not dropping the anchors to say, "I can stand by idly and do nothing, and rely on the tug and permit my ship to drift as a helpless hulk against the pier", an obvious fate in sight for over 1800 feet, when, in fact, she was not a hulk at all, but in full possession of her power, and when, in fact, the tug believed, and properly believed, that she was in full possession of her power and could back the necessary additional 100 feet to safety at any moment.

We submit that in view of the clear difference of reasoning between the case at bar and *The Westchester* case, since reported, that we should be granted a rehearing.

CONCLUSION.

The "Edith" "cannot have her cake and eat it too". If she wishes to cast the responsibility on the tug after

the tow line was dropped, she must show that she gave to the tug the information upon which primarily rested the successful discharge of that responsibility.

We argued four points resting on this hypothesis. We have failed to obtain their consideration. Justice would seem to require, that, even if this be due to a failure of advocacy, the court, on recognizing that they have not been considered, should rehear the case.

The recent case of *The Westchester* would seem to give additional warrant for the rehearing.

Dated, San Francisco,
March 15, 1919.

WILLIAM DENMAN,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
March 15, 1919.

WILLIAM DENMAN,
Of Counsel for Appellant and Petitioner.